UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUDREY CUTTING and
SYLVIA A. HENDERSON
Appellants
vs.
RAY BULLERDICK, et al,
Appellees

No. 12324

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from a Decree of Judgment rendered by the District Court for the Territory of Alaska, a Court of general jurisdiction. The Decree of Judgment grants a foreclosure against the real property of the appellant Sylvia A. Henderson, as authorized by Section 26-9-3, Compiled Laws of Alaska, 1949, and other sections of Chapter Nine, Title Twenty-Six. This Court has jurisdiction under the provisions of Title Twenty-Eight, U. S. C. A. Section 1291 and 1294.

STATEMENT OF FACTS

The appellant, Audrey Cutting, a resident of the City of Anchorage in the Territory of Alaska, the mother of appellant Sylvia A. Henderson, a minor, on or about the 30th day of November, 1946, purchased, with funds paid to her by her former husband, the

father of Sylvia Henderson, from one Ralph R. Thomas of Anchorage, for and on behalf of her minor daughter, Sylvia Henderson, a building lot in Anchorage, which lot is more particularly described in defendant's exhibit No. 101, a Warranty Deed set forth in full on page 343 of the Transcript of Record, by which Ralph Thomas conveyed the lot to Sylvia A. Henderson. At the time of the execution and delivery of the Deed to Sylvia A. Henderson, the vendor took back from the said Sylvia Henderson, a mortgage (TR 415) as security for payment of thepurchase price, together with a note (TR 419) providing for installment payments. However, inadvertently or otherwise, these papers, including the Warranty Deed, Mortgage, and Note werenot recorded with the United States Commissioner and Ex-Officio Recorder of Deeds for the Anchorage Precinct, but were placed with the Union Bank of Anchorage, and that no recording of the instruments occurred until the 4th day of August, 1948, when the Warranty Deed, conveying the property from Ralph R. Thomas to Sylvia A. Henderson was filed for recording.

Meanwhile, and on or about the 30th day of April, 1948, Audrey Cutting entered into a contract with one Russell Smith, a local building contractor and intervenor in the trial of this case through his trustee in bankruptcy, Herald Stringer, which contract was introduced into evidence as Russell Smith's Exhibit No. 1 (TR 256, line 27) and certain paragraphs of which, for the purposes of this Statement of Fact, are set forth, as follows:

INDEPENDENT CONTRACTOR'S AGREEMENT

THIS AGREEMENT, made this 30th day of April, 1948, by and between RUSSELL W. SMITH, an independent contractor doing business in theCity of Anchorage, Alaska, hereinafter called the "Contractor," and AUDREY CUTTING, a married woman, of Anchorage, Alaska, hereinafter called the "Owner," WITNESSETH:

That, Whereas, the Owner is the owner of Lot Two (2) in Block Thirty-seven "D" (37-D) of the South Addition to the original townsite of Anchorage, Alaska, and is desirous of having constructed thereon a one-story dwelling house with full basement; and

WHEREAS, the Contractor has agreed to construct said house, within the time and at the price stated herein, and according to the specifications as hereinafter set forth:

NOW, THEREFORE, the parties hereto do hereby agree as follows:

That the Contractor will construct said house, according to the plans and blueprints furnished by the Owner, which said plans have heretofore been agreed upon, and will perform all the work entailed in a workmanship like manner to the satisfaction of the Owner. The specifications shall be as follows:

Dimensions: (Paragraph Deleted)
Excavations: (Paragraph Deleted)
Basement: (Paragraph Deleted)
Floors: (Paragraph Deleted)

Sidewalls, Ceilings and Partitions: (Paragraph Deleted)
Roof: (Paragraph Deleted)
Outside Siding: (Paragraph Deleted)
Wiring: (Paragraph Deleted)
Insulation: (Paragraph Deleted)
Plumbing: (Paragraph Deleted)
Cabinet Work: (Paragraph Deleted)
Woodwork: (Paragraph Deleted)
Doors and Windows: (Paragraph Deleted)
Painting and Decorating: (Paragraph Deleted)
Miscellaneous: (Paragraph Deleted)

The Contractor agrees to complete this contract within 60 days after the commencement of the work, PROVIDED, however, that all materials are available; and PROVIDED FURTHER, that there is no delay on the part of the painters which may be beyond the control of the Contractor.

The Contractor further agrees that the work shall be in every respect at the risk of the Contractor until completed and accepted by the Owner, except as to damages or injuries caused directly by the Owner or the Owner's agents or employees; and the Contractor shall furnish the Owner, before commencement of the work, with proof of adequate insurance coverage, satisfactory to the Owner, covering Workmen's Compensation and Employer's Liability, and Contractor's Public Liability and/or Property Damage; and shall indemnify and save harmless the Owner from claims under the Workmen's Compensation Act and from

any other claim for damages for personal injury, including death to any employee, or other person, or injury to property, that may arise, or may be alleged to arise, in any manner from the carrying out of this contract whether by the Contractor or by any subcontractor, or by any one employed by either of them.

The Contractor further provides and agrees to give the proper authorities all requisite notice relating to the work, and to obtain all official permits and licenses required for the prosecution of any of the work embraced in this contract, and to abide by all the laws, ordinances, regulations and other rules, federal, territorial or municipal, applicable thereto.

The Contractor shall promptly pay for all materials, supplies and all labor employed by him in the work, to the end that the property may be kept free from materialmen's and mechanic's liens, and shall promptly discharge such liens, if any.

The Contractor shall give personal attention to the faithful prosecution and completion of the work, and shall be present either in person or by a competent and duly authorized representative on the site of the work continually during its progress.

The Owner shall pay the Contractor in full at the completion of this contract upon the Contractor's turning the said house over to the Owner, and the full price for the Contractor's services, including all materials and labor furnished in the performance of this contract, shall be the sum of NINE THOUSAND EIGHT HUNDRED DOLLARS ($9,800.00).

Neither party to this contract shall assign this contract nor any interest therein, without the written consent of the other.

It is expressly agreed that this instrument contains the entire agreement between the parties, and that no statement, promise, or inducement made by any party hereto, or employee, agent or salesman of any part hereto, which is not contained in this written contract, shall be binding or valid; and this contract may not be enlarged, modified or altered except in writing signed by th eparties and indorsed hereon.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 30th day of April, 1948.

Signed, sealed and executed in the presence of
(s) Margaret Kish
(s) J. L. McCarrey, Jr.

(s) Russell W. Smith (SEAL)
Contractor

(s) Audrey Cutting (SEAL)
Owner

ACKNOWLEDGEMENT

In this Contract the said Russell Smith described himself as an independent contractor and designated himself as the "Contractor" while Audrey Cutting designated herself as the "Owner."

Simultaneously with or immediately following the execution of the foregoing Contract, the Contractor commenced construction of the residence described in the Contract and arranged for the delivery of building materials from certain specified materialmen and

hired laborers who agreed to permit the Contractor to withhold payment for services and materials until completion of the job, at which time the said Audrey Cutting would be obligated to pay the contract price. The laborers had agreed to waive this right to weekly payment for services rendered upon the promise of the contractor to pay a bonus of ten cents per hour over and above the regular carpenter's contract rate. (TR 272, line 23).

Audrey Cutting, according to her testimony, posted notices of non-responsibility in and about the premises within five days of the commencement of the job, which claim on the part of Audrey Cutting is disputed by testimony of the plaintiffs, and intervenors, and the Court found that notices, if any, were not posted until some time after the five day period. Following commencement of the work, the house proceeded towards completion and that sometime near the end of June, the contractor delivered the keys to Audrey Cutting (TR 289, Line 20) and informed her that the work was completed but in the course of his testimony failed to fix the exact date that the contract was completed as revealed by his testimony appearing at TR 279-280, particularly lines 5 and 6 of Page 280, wherein the contractor testified in response to a question asked by counsel "would it have been June, July or August?" (meaning date of completion) to which the contractor replied, "I don't exactly recall but don't believe it was in June." The Contractor on this date alleged, requested that Audrey Cutting pay to him the sum of $13,500.-

00 which was $3,700.00 in excess of the price agreed to in the Contract and in excess of the price of the agreed extra work (construction of porch). The appellant insisting that the Contractor had agreed to construct the porch for approximately $200.00 (TR 259, last paragraph) and the Contractor insisting that the price would be $400.00, or more, (TR 284, Line 21), the total price demanded by the Contractor was at least in excess of $3,000.00, over and above the contract price plus the extra. The appellant, Audrey Cutting, in addition to objecting to the demand of $13,500.00, claimed that certain phases of the construction were incomplete and that as a result of the dispute as to excess costs and incompleted work between the appellant Audrey Cutting and the Contractor, Russell Smith, nothing was paid on the Contract at this time. The Contractor, by reason of his special agreement with the materialmen and laborers, had not paid for the material and labor as the job progressed and was unable to make payment at the time of the dispute. Meanwhile, the laborers and materialmen filed mechanic's liens against the property. Upon the filing of said liens, no further negotiations were had towards the settlement of the contract price and subsequently and on or about the 24th day of July, 1948, suit was commenced in the District Court by filing complaints on behalf of said laborers and materialmen and service was made upon the defendants Audrey Cutting and Ralph Thomas. Sylvia Henderson, however, who was attending school in Portland, Oregon, was not named in the

original complaints as a party defendant and was not served with a copy of the Summons or Complaint and was, at no time thereafter, served with process. Meanwhile, other materialmen intervened in the suit and following the filing of numerous complaints, complaints in intervention, answers and replies, the cause went to trial on the 8th day of February, 1949.

The liens were proved and admitted into evidence, testimony of witnesses was taken and documentary evidence introduced. During the course of the trial, it developed that Sylvia Henderson was a minor (TR 262, Lines 11 and 12, TR 487, Line 18) and that she had not been made a party defendant in the original complaints, and was only mentioned in complaints of certain intervenors by reference; that she had not been served with process; and that no guardian or guardian ad litem had been appointed to protect her title to the real property. At the close of the trial it was moved by defendants' counsel (TR 559, Lines 5 to TR 562, Line 9) that the case against Sylvia Henderson be dismissed because no guardian or guardian ad litem had been appointed as provided by law. Whereupon, the Court by its nunc pro tunc order and against objections, appointed Audrey Cutting guardian ad litem for Sylvia Henderson (TR 561, Lines 11-21).

Following argument, the case was taken under advisement and subsequently the Findings of Fact (TR 77) and the Judgment and Decree (TR 98) were signed and entered, and the Court thereupon issued

the Execution and Order of Sale of the real property of Sylvia Henderson. Whereupon, appellants took this appeal and filed their Bond accordingly.

DESIGNATION OF POINTS

The appellants assign the following as the errors of the trial court on which they propose to rely in this appeal.

I

That the trial court erred in denying the motion of counsel for defendants to dismiss at the close of the plaintiff's case on the grounds that the complaints of the original plaintiffs and plaintiffs intervenor did not state good causes of action against the defendants.

II

That the trial court erred in denying the motion of appellants counsel to strike the lien claims filed by plaintiffs and to dismiss at the close of plaintiff's case on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson.

III

That the trial court erred in denying the motions of appellants counsel to dismiss against the defendant, Audrey Cutting, on the grounds that she was neither owner of the property nor agent of the true owner, Sylvia A. Henderson.

IV

That the trial court erred in amending sua sponte and by judgment the pleadings of plaintiffs to con-

tain essential allegations not previously set forth therein.

V

That the trial court erred in amending the plaintiff's pleadings sua sponte and by judgment to include defendant Sylvia A. Henderson as a party defendant.

VI

That the trial court erred in amending sua sponte and by judgment the complaints of plaintiffs sufficient to make good causes of action.

VII

That the trial court erred in refusing to follow the case of Russell vs. Hayner 130 Federal Reporter p. 90, as to the essential allegations of complaints and lien claims in lien foreclosure suits.

VIII

That the trial court erred in allowing the lien claims against the real property of an infant, the said Sylvia A. Henderson.

IX

That the trial court erred in ordering sold by its Judgment the real property of Sylvia A. Henderson, a minor.

X

That the trial court erred in rendering personal judgment against the defendant, Audrey Cutting, who was neither owner nor agent of the owner of the said real property.

XI

That the trial court erred in rendering judgment

against the real property of Sylvia A. Henderson, when the said Sylvia A. Henderson had not been served personally or constructively with summons in accordance with the laws of Alaska.

XII

That the trial court erred in denying the motion to dismiss against Sylvia A. Henderson, at the close of the trial, on the grounds that she was not made a party of the action by personal or constructive service of summons, and as an infant was not before the court through a general guardian or guardian ad litem.

XIII

That the trial court erred in appointing Audrey Cutting guardian ad litem at the close of the trial by its order nunc pro tunc.

XIV

That the trial court erred in finding against the evidence, that there was no delivery of the deed of the real property from Ralph Thomas to Sylvia A. Henderson.

XV

That the trial court erred in finding against the evidence, that Sylvia A. Henderson did not execute a mortgage to Ralph Thomas of said real property.

XVI

That the court erred in permitting plaintiffs, Ketchikan Spruce Co. to support their case by presenting additional testimony after both plaintiff and defendant had rested, and subsequent to the motion of defendant counsel to dismiss on the grounds of failure to make a prima facie case.

A FURTHER STATEMENT REGARDING POINTS RELIED ON

Following an examination of the Designation of Points, made a part of this Record and appearing commencing at TR 574, it has been determined that the arguments regarding certain of the points cited as error are similar to or identical to other points and involve the same citations of authority. Appellants will, therefore, incorporate wherever possible, the similar points and treat one or more points together as one point.

ARGUMENT

FIRST POINT RAISED: 1. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF COUNSEL FOR DEFENDANTS TO DISMISS AT THE CLOSE OF THE PLAINTIFF'S CASE ON THE GROUNDS THAT THE COMPLAINTS OF THE ORIGINAL PLAINTIFFS AND PLAINTIFF INTERVENORS DID NOT STATE GOOD CAUSES OF ACTION AGAINST THE DEFENDANTS.

The appellants rely on the case of Russell vs. Hayner 130 Fed. 90 as a standard for testing the Complaints of the plaintiffs as it pertains to liens and lien foreclosure suits in the Territory of Alaska. This was a case arising in the District Court of the United States for the Second Division of the District of Alaska, in which the trial court sustained a demurrer to a complaint filed by one Russell upon the grounds that the

plaintiff's lien claim was defective and that the complaint filed did not state facts sufficient to constitute a cause of action. The plaintiff, having elected to stand on his complaint, the Court ordered the suit to be dismissed whereupon defendants took judgment for their costs and from that judgment, an appeal was taken to the Court of Appeals for the Ninth Circuit. Following an examination of the complaint and the Alaska Law applicable to liens and lien foreclosure proceedings, the Court affirmed the ruling of the trial court and set forth as a part of its ruling, the essential requirements for stating a good cause of action for lien foreclosure under the Alaska Law and defined also the essential requirements of a mechanic's lien under said law.

An examination of the two original complaints, No. A-5087 (TR 3) and No. A-5088 (TR 117), reveals that the complaints do not meet the requirements as set forth in Russell vs. Hayner and by applying those necessary requirements of good causes of action to the plaintiff's complaint, we find that said complaints are fatally defective on the same grounds that the appeal court found the complaint of Russell fatally defective. The two foregoing Complaints did not state that the true owner was unknown and that the reputed owner was (the name of the reputed owner) and did not allege that the work or labor was done at the instance of the owner of the building or his agent.

SECOND POINT RAISED: 2. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF DEFENDANTS COUNSEL TO STRIKE THE LIEN CLAIMS FILED BY PLAINTIFFS AND TO DISMISS AT THE CLOSE OF PLAINTIFF'S CASE ON THE GROUNDS THAT THE LIEN CLAIMS DID NOT CONTAIN SUFFICIENT FACTS TO CONSTITUTE VALID LIENS AGAINST THE REAL PROPERTY OF SYLVIA A. HENDERSON.

In support of appellants contention that the Court erred in refusing to strike the lien claims filed by plaintiffs on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson, we again refer to the case of Russell vs. Hayner supra. Herein the essential requirements of mechanic's liens, by virtue of the Alaska mechanic's lien law, has been established and we quote from the case as follows:

> "A mechanic's lien is purely of statutory creation, and can only be maintained by a substantial observance and compliance with the provisions of the statute. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of the lien is indispensable."

We quote further from the Russell case as follows:

"The mere fact that appellants built the structure at the instance of Hayner, who was in possession of the land under a contract of purchase with the owners, is not, of itself, sufficient to constitute a valid lien upon the building. In order to bring the case within the provisions of section 262, it must be alleged and proved that the work or labor was done "at the instance of the owner of the building, or his agent," for it is only where such facts appear that the provisions of section 262, to the effect that "every contractor . . . builder, or other person, having charge of the construction . . . of any building as aforesaid, shall be held to be the agent of the owner for the purpose of this Code . . ." applies. To authorize a lien under the provisions of this section, there must be an employment by the owner of the building, or his authorized agent, and the employment of the contractors by Helen F. Hayner, who was accupying the land under a contract of purchase, does not constitute the employment contemplated by this provision of the Code."

An examination of the claims of lien which were filed on behalf of the laborers and recorded prior to the filing of the complaint, (see TR 17, 18, 20, 22, 23 and 25) fails to show that the labor was furnished at the request of the owner, which requirement is essential in a proper lien and we call attention to the last

sentence of the above quoted paragraph from the Russell case which reads, "To authorize a lien under the provisions of this section, there must be an employment by the owner of the building, or his authorized agent . . ." and any lien filed under the Alaska law which does not contain that allegation or, in the words of the Russell case "does not state that the material was furnished at the request of the owner, is fatally defective." The lien itself standing independent, existing as an encumbrance against real property in the Territory of Alaska, must state that the work or material was furnished at the request of the owner or at least the owner's agent and the claims of lien filed on behalf of the laborers do not contain any such allegation. The lien claim fails to state that the owner is unknown and that the reputed owner is (naming the reputed owner). These particular lien claims read as follows: "That the owners and reputed owners of the property are Ralph Russell Thomas and Audrey Cutting." and thus are defective.

THIRD POINT RAISED: 3. THAT THE TRIAL COURT ERRED IN DENYING THE MOTIONS OF DEFENDANTS COUNSEL TO DISMISS AGAINST THE DEFENDANT, AUDREY CUTTING, ON THE GROUNDS THAT SHE WAS NEITHER OWNER OF THE PROPERTY NOR AGENT OF THE OWNER, SYLVIA A. HENDERSON and TENTH POINT RAISED: 10. THAT THE TRIAL COURT ERRED IN RENDERING PERSONAL JUDGMENT AGAINST THE DEFENDANT, AUDREY CUTTING, WHO WAS NEITHER OWNER NOR AGENT OF THE OWNER OF SAID REAL PROPERTY.

NOTE: Points Three and Ten will be considered together.

Regardless of the allegations of the complaints and the allegations of ownership contained in the claims of lien recorded and made part of the complaints, the trial, its testimony, and the various answers and replies filed herein, showed conclusively that Audrey Cutting was neither the owner of the real property nor the agent of the owner and that sole title to the property was vested in Sylvia A. Henderson, a minor, during and at all times referred to in the complaint and thereafter, and particular attention is called to defendant's second amended answer (TR 61) and the third amended answer (TR 65) which amended answers were filed by authority of the Court during the trial of the cause to conform with the proof and in both amended answers Audrey Cutting denies

that she is the owner of the premises and Sylvia A. Henderson alleges that she is the owner of the premises. We call attention to the testimony of Audrey Cutting which was adduced on the first day of the trial (TR 253) in which the witness Audrey Cutting testified that she purchased the lot for her minor daughter and refer also to the stipulation (TR 242, commencing with Line 20) which was presented to the Court by Attorney Davis prior to the taking of the testimony which appears in the Record (TR 253) by which he informed the Court that the record owner of the property was one Ralph Russell Thomas but that on the fourth day of August, 1948, a Deed was recorded in the office of the United States Commissioner for the Anchorage Precinct from Ralph Russell Thomas to Sylvia A. Henderson and that the deed was executed by said Ralph Russell Thomas on the 30th day of November, 1946. It is therefore beyond dispute that the sole owner of the property and the only person who had an interest therein from the 30th day of November, 1946, and during all of the times referred to in the complaint and during the trial of this cause, and thereafter, was Sylvia A. Henderson and that Audrey Cutting had no interest in said property, no right and title therein; was not the agent of Sylvia A. Henderson by virtue of any Power of Attorney, agreement or legal guardianship, and while the said Audrey Cutting was responsible for making a contract with said Russell Smith and could undoubtedly be held to answer at law for the contract price thereof, she could

not be held to answer in a suit to foreclose a lien. We again call the Court's attention to the language appearing in the last paragraph of the Russell vs. Hayner supra—"But this is purely an equity suit, wherein appellants seek relief only under the benefits of the law relative to the liens of mechanics and others. They could doubtless bring an action at law to recover a judgment against Helen F. Hayner for whatever amount of money is found due under the contract." It does not appear, in any of the testimony adduced in the trial of this cause or in any of the Complaints or lien claims filed herein that any of the plaintiffs or claimants made any effort to determine who the true owner of the property was and on the basis that it is the duty of a materialman and/or laborer, when he furnishes material or performs labor upon premises that he ascertain the true owner; his failure to do so gives him no right to file a lien or foreclose the same against the true owner when it develops that the person whom he casually assumed to be the true owner turns out to be a disinterested party altogether and that the true owner is one whom the materialman and/or laborer had not previously considered. In support of this principle of law, we cite the case of McCarty vs. Carter 95 Amer. Dec. 572 which case was decided by the Supreme Court of Illinois 1868 and which reads as follows:

> "Mechanics and materialmen are bound to ascertain whether the party with whom the contract is made is a minor or person otherwise incapacitat-

ed, for if the contract is with such a person, it is not binding, and the lien of the contractor will fail, and a contract for erection of a building upon premises by one who is not the owner thereof, and who is unauthorized to so contract, is not ratified so as to allow a claim of lien against the premises by mechanics and materialmen, by the fact that the owner, after the completion of the house, received the rents and profits therefrom."

At no time during the trial of the cause did it appear or was it proved by the plaintiffs that Audrey Cutting had any authority whatever to act as agent for Sylvia A. Henderson in the making of the contract or in authorizing the construction upon the premises and inasmuch as the stipulation referred to (TR 242) excludes Audrey Cutting as either an owner or an agent by failing to mention that she was either an owner or an agent, it appears that there are insufficient grounds upon which to base claims of lien for work performed and materials furnished and a judgment based on the proof of ownership or agency of Audrey Cutting certainly is not in accordance with the Alaska Law (ACL 1949, Section 26-1-1) which provides specifically that the work or labor was performed "at the instance of the owner of the building, or his agent."

FOURTH POINT RAISED: 4. THAT THE TRIAL COURT ERRED IN AMENDING SUA SPONTE AND BY JUDGMENT THE PLEADINGS OF PLAINTIFFS TO CONTAIN ESSENTIAL ALLEGATIONS NOT PREVIOUSLY SET FORTH THEREIN and SIXTH POINT RAISED: 6. THAT THE TRIAL COURT ERRED IN AMENDING SUA SPONTE AND BY JUDGMENT THE COMPLAINTS OF PLAINTIFFS SUFFICIENT TO MAKE GOOD CAUSES OF ACTION.

NOTE: Points Four and Six will be considered together.

It is contended by appellants that the trial court erred in amending the Complaints on its own volition sua sponte and by judgment in order to make said complaints conform to the standards of pleading set forth in the case of Russell vs. Hayner 130 Fed. 90.

Upon argument (TR 559), counsel for appellants called attention to the Russell-Hayner case and showed that the various complaints and claims of lien filed in the subject case did not state good causes of action as established by the Russell-Hayner case. Plaintiffs argued that the complaints did state good causes of action and the Court denied the motion. However, in the Court's oral opinion, the following language is found:

"I do not know why it should be necessary to plead anything that the law says exists. The law

says that work done under such circumstances shall be considered to be done—shall be deemed to be done—and materials furnished shall be deemed to be furnished at the instance of the owner.

Yet, our own Circuit Court of Appeals in the case of Haines against Russell evidently held that it was necessary to plead what the law itself provides to be the fact. That decision, it is true, was rendered in 1904. But as far as I know it has never been overruled.

Therefore, I follow it to the extent of saying that the pleadings may be considered amended to contain such averment." (See Supplemental Transcript of Record).

It is thought that the Court exceeded its discretion in amending the complaints to provide allegations not previously included and particularly when plaintiffs had insisted that the complaints did state good causes of action and the Court had previously denied defendants' Motion to Dismiss.

FIFTH POINT RAISED: 5. THAT THE TRIAL COURT ERRED IN AMENDING THE PLAINTIFFS PLEADINGS SUA SPONTE AND BY JUDGMENT TO INCLUDE DEFENDANT SYLVIA A. HENDERSON AS A PARTY DEFENDANT.

It is appellants contention that the court committed error when, by its oral opinion, it amended the pleadings sua sponte by the following language:

"Some of the pleadings fail to refer to the claim of the defendant, Sylvia Henderson. Those pleadings under the proof may be considered as amended by stating in substance that the defendant, Sylvia Henderson, claims some title or interest in the property adverse to the plaintiffs and intervenors but that such claim and title is subordinate to the claims of plaintiffs and intervenors and it shall be considered that any part of the pleadings adverse to the claim of the defendant, Sylvia Henderson, or any other defendant is denied." (See Supplemental Transcript of Record).

It should be remembered that Sylvia Henderson had not been named as a party defendant in the original complaints filed in this action and that no service of process was ever obtained, requested or attempted upon Sylvia Henderson who was absent from the Territory during all this time, commencing prior to the filing of these actions and the final judgment in the case, and that by the use of the language referred to above in the oral opinion, the Court erroneously makes Sylvia A. Henderson a defendant and amends all of the pleadings to show that Sylvia Henderson claims some title or interest in the property adverse to the plaintiffs and intervenors. Now, it is too obvious for argument to assume that Sylvia Henderson, thus became a defendant so that a valid judgment could be rendered against her and the sale of her property ordered by this action of the Court and it is appellants

contention that Sylvia A. Henderson was not before the Court previously by any kind of legal service of summons or by any kind of representation by guardian or guardian ad litem and that therefore this amendment and the subsequent judgment and decree had no force whatever in bringing Sylvia A. Henderson before the Court as a party defendant.

EIGHTH POINT RAISED: 8. THAT THE TRIAL COURT ERRED IN ALLOWING THE LIEN CLAIMS AGAINST THE REAL PROPERTY OF AN INFANT, THE SAID SYLVIA A. HENDERSON and NINTH POINT RAISED: 9. THAT THE TRIAL COURT ERRED IN ORDERING SOLD BY ITS JUDGMENT THE REAL PROPERTY OF SYLVIA A. HENDERSON, A MINOR.

NOTE: Points Eight and Nine will be considered together.

By uncontradicted testimony of Audrey Cutting, the defendant Sylvia Henderson appeared to be a minor female child who had received the property by a conveyance from one Ralph Russell Thomas on the 30th day of November, 1946, and that on that same date or the day following, the said Sylvia A. Henderson executed a mortgage and mortgage note which was filed, together with the deed in the Union Bank at Anchorage, Alaska, and from that date until the 4th day of August, 1948, when the mortgage note was paid off, the said deed remained on file in said Bank

and no present recording of said deed occurred. (TR 409 to 430). However, the fact remains that Ralph Thomas had divested himself on the 30th day of November, 1946, of all interest in said property and that the said Sylvia A. Henderson, on that date, became the legal owner of said property and that the said Sylvia A. Henderson, while represented occasionally by her mother, Audrey Cutting, had no properly appointed guardian authorized to legally represent her in matters pertaining to her affairs and particularly pertaining to the real property owned by her in the City of Anchorage as previously described. That upon the conclusion of the trial there remained no doubt as to the true owner of the real property involved in this foreclosure suit and there remained no doubt that Sylvia Henderson was a minor. Nevertheless, disregarding the minority of the owner of the real property, the Court foreclosed the liens filed by the various laborers and materialmen and ordered the sale of the property in payment of the claims of the mechanics and materialmen and the appellants contend that this ruling of the trial court was in error.

It is appellants' contention that the trial court erred in allowing the lien claims against the real property of Sylvia A. Henderson, an infant. The infancy of appellant Sylvia A. Henderson is beyond dispute and was established by the testimony of her mother, Audrey Cutting (TR 262, Lines 11 and 12) in which the Court inquired

"What is her age at the present time (Sylvia A. Henderson)?" and the witness (Audrey Cutting) replied

"She is seventeen."

And subsequently, counsel for appellants moved the Court to permit the defendants to file an Amended Answer (TR 487, commencing with Line 13) and following counsel's explanation that the Amended Answer alleged the minority of the defendant, Sylvia A. Henderson to conform with the evidence. The Court then said

"Is there any objection?"

to which attorney for plaintiffs replied

"I have none."

The Court then said:

"Without objection, the Amended Answer of Audrey Cutting and Sylvia Henderson may be filed."

In TR 489, Line 18, counsel for the original plaintiffs said, as follows:

"Mr. Grigsby: We admit that Sylvia Henderson is a minor."

Now, it is appellant's contention that the lien claims against the real property of a minor are not valid and we cite in support Jones on Liens, Volume 2, Section 1239, which reads as follows:

"There can be no mechanics' lien upon the land of a minor, for he can make no contract which is binding upon himself or his property. The lien is incident only to a legal liability to pay a debt. It is immaterial that the minor represented himself to be of age. Even if there be a contract with his guardian for erecting a building upon a minor's property, no lien is conferred if the guardian had no authority in law to make the contract."

In the case of Guy vs. De Uprey 76 Amer. Dec 518, a case decided by the Supreme Court of California, July, 1860, the Court held, in this case, which involved a situation where a mother purchased property and then conveyed the same to her minor children, that

"Party contracting with guardian to erect buildings on property of infant ward has no equitable lien upon the property for the value of the improvements, if the contract was made without any legal authority on the part of the guardian, with full knowledge of the title and condition of the property on the part of the other party."

The case of Burke and Williams vs. Mac Kenzie 52 S. E. 653, a case decided by the Supreme Court of Georgia, 1905, in which the Court held that

"A contract for the improvement of the real estate of a ward by the erection of buildings thereon is not one which the law authorizes the guardian

to enter into and charge the ward's estate therefor."

It will be noted here that the Alaska Compiled Laws 1949, Section 62-2-1 provides that guardians must first obtain license from the Court before selling or encumbering the ward's property. The case of Fish vs. McCarthy 31 Pac. 529, decided by the Supreme Court of California 1892, holds as follows:

"Where a mechanic performs work on the property of minors under a contract with the guardian, the mechanic's lien cannot be enforced, where the guardian has not obtained an order of the Court authorizing her to do the work."

We have previously cited the case of McCarthy vs. Carter 95 Amer. Dec. 572, which case was decided by the Supreme Court of Illinois, Sept. 1868 and deals with the duty of mechanics and materialmen to ascertain with whom they deal

"Mechanics and materialmen are bound to ascertain whether the party with whom the contract is made is a minor or person otherwise incapacitated, for if the contract is with such a person, it is not binding and the lien of the contractor will fail."

and further states that

"Contract for erection of building upon premises by one who is not the owner thereof, and who is

unauthorized to so contract, is not ratified so as to allow a claim of lien against the premises by mechanics and materialmen, by the fact that the owner, after the completion of the house, received the rents and profits therefrom."

We cite further Corpus Juris, Volume 40, Section 90, Page 101, which reads as follows:

"An infant being under a common law disability to contract cannot by a contract for the improve- of his land subject it to a mechanics lien for such improvement; nor will a retention of the property as improved, after majority, amount to such ratification as to sustain a lien * * * Of course there is no lien on an infant's property under a contract made by another person not his guardian and not possessing any authority to bind him."

Clark, in his Summary of American Law, Page 153, states as follows:

"It is doubtful whether a Court of equity has inherent power to order a sale of an infant's real property."

The above statement of general principle is supported by the case of Denniston, etc. Co. vs. Brown 167 N. W. 190 and further by Richardson vs. Little 96 S. 144; McCarty vs. Carter 95 Amer. Dec. 572; Alvey vs. Reed 17 N. E. 265; Bloomer vs. Nolan 53 N. W. 1039. With reference to any person who falsely represents

himself as owner and enters into a contract for a building, the Courts have ruled as follows: Mahon vs. Bitting 137 S. E. 889. This case was decided in 1927 by the Supreme Court of Appeals for West Virginia and holds as follows:

> "That a contractor entered into a contract with a person who falsely held himself out at the owner of property, to furnish materials and erect a building on the land, and, after the material was furnished, the work completed and the mechanics lien filed, the pretended owner actually acquired title, the after acquired title would not support the mechanic's lien."

The owner of property was held to be not personally liable in the case of Allison vs. Schuler 36 Pac. 2nd 519. This case, decided by the Supreme Court of New Mexico in 1934 held that the owner of real property was not personally liable to subcontractors for work and material where there was no contractual relation between them, and principal contractor agreed to make payment. The contractor, in the subject case, Russell Smith, had a contract with Audrey Cutting, who identified herself, for the purposes of the contract, as Owner, whereby the said Russell Smith agreed to build a house for the said Audrey Cutting on the real property hereinbefore described under terms and conditions by which the contractor agreed to promptly pay for all materials, supplies and all labor employed by him on the work, to the

end that the property be kept free from materialmen's and mechanic's liens and that he would promptly discharge such liens, if any. It is necessary, at this time, to determine whether there was a contractual relationship between the owner of the property, i. e. Sylvia A. Henderson and the subcontractors performing the work at the instance and request of the contractor, Russell Smith, and, from an examination of the facts, it would appear that there was not. The only contract in existence was a contract between Audrey Cutting and Russell Smith and it is contended that Audrey Cutting had no authority in law or in fact to make a contract for and on behalf of Sylvia A. Henderson for improvements upon the land that would, in any way encumbered or become a burden upon her real property and that even if she (Audrey Cutting) had been the legally appointed guardian of Sylvia Henderson, in order to improve the property through construction of a building thereon, she would have had to obtain the consent of the Court, under Alaska Law so to do, (Alaska Compiled Laws 1949, Section 62-2-1) and therefore the said Russell Smith entered into a contract with an individual who had no authority whatever to bind the real property and any subcontractor working on the said property under contract with and under direction of Russell Smith, likewise were without contractual coverage with Sylvia Henderson and may not, under the law, file lien claims against said real property. It may be considered that Audrey Cutting was an agent acting for and

on behalf of Sylvia Henderson, however, an infant cannot appoint an agent for this purpose, and we cite the case of Tucker vs Eastridge 100 N. E. 113, decided by the Appellate Court of Indiana, 1912, which holds that:

> "An instruction which assumes that an infant may either enter into a binding contract or may appoint an agent for that purpose is properly refused."

and the case of Burns vs. Smith 64 N. E. 94, a case decided by the Appellate Court of Indiana 1902 holding that

> "An infant, even though married, could not appoint an agent or become liable for the latter's wrongful acts."

Mechem on Agency, Book I, Chapter 3, Section 51, under the heading "Persons Legally Incompetent." "Infants as Principals." has the following to say regarding infants as principals:

> "It has been regarded as the settled doctrine of the Law that an infant cannot empower an agent or attorney to act for him. Indeed, the rule deduced from the authorities has been said to be that the only act which an infant is under a legal incapacity to perform is the appointment of an attorney, or, in fact, an agent of any kind. The reason upon which this rule depends, has been well

stated by the learned editors of the American Leading Cases, as follows: 'The constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, FOR IT IS IMPARTING A RIGHT WHICH THE PRINCIPAL DOES NOT POSSESS,—that of doing valid acts." (Emphasis ours).

The case of Bloomquist et. al vs. Jennings, et. al, Supreme Court of Oregon, 1926, holds that "minor's appointment of agent is voidable."

ELEVENTH POINT RAISED: 11. THAT THE TRIAL COURT ERRED IN RENDERING JUDGMENT AGAINST THE REAL PROPERTY OF SYLVIA A. HENDERSON WHEN THE SAID SYLVIA A. HENDERSON HAD NOT BEEN SERVED PERSONALLY NOR CONSTRUCTIVELY WITH SUMMONS IN ACCORDANCE WITH THE LAWS OF ALASKA and TWELFTH POINT RAISED: 12. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS AGAINST SYLVIA A. HENDERSON AT THE CLOSE OF THE TRIAL ON THE GROUNDS THAT SHE WAS NOT MADE A PARTY TO THE ACTION BY PERSONAL OR CONSTRUCTIVE SERVICE OF SUMMONS, AND AS AN INFANT WAS NOT BEFORE THE COURT THROUGH A GENERAL GUARDIAN OR GUARDIAN AD LITEM.

NOTE: Points Eleven and Twelve will be considered together.

In support of this point appellants show that during all the period of time of the filing of the first complaint and the complaints in intervention and the trial of this case that Sylvia A. Henderson was in school in Portland, Oregon and outside the jurisdiction of the Alaska Courts and while legal service of summons together with copies of the original complaints were served upon Audrey Cutting and Ralph R. Thomas, that Sylvia A. Henderson was not made a party to the

original complaint, No. A-5087, nor original complaint No. A-5088.

However, on filing of the Notice entitled Notice of Motion for Leave to Intervene and Make Additional Parties Defendant, (TR 141) filed on the 21st day of October, 1948, the attorney for the Anchorage Sand and Gravel Company notified the Court that he would request authority to name, as party defendant, Audrey Cutting, the mother and next friend of Sylvia A. Henderson, a minor, and that the Order granting leave to intervene gave authority to list, among other parties defendant "and Sylvia A. Henderson, a minor, who have interest in the subject matter to be determined by the Court in the case of Ray Bullerdick et al." (TR 149, Lines 10, 11 and 12) and that this Order was endorsed by the Court and filed on the 10th day of November, 1948. And that subsequently, all complaints in intervention listed Sylvia A. Henderson as a party defendant. However, regardless of the action of the Court permitting the plaintiffs in intervention to add the name of Sylvia A. Henderson, a minor, to the complaints in intervention, at no time subsequent thereto, was a summons ever issued or service made upon the said Sylvia A. Henderson and that she was not a party to the case or made a party thereto or brought into Court by the service of process in accordance with the laws of Alaska and appellants contend that any decision of the trial court dealing with Sylvia A. Henderson or her real property was beyond the jurisdiction of said court and that any judgment against Sylvia A.

Henderson or her property is invalid. The laws of Alaska regarding service of process provide as follows: Section 55-4-6, Compiled Laws of Alaska 1949

> "The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the clerk of the court as follows:
>
> Third: (Action against minor). If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or if there be none within the Territory, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.
>
> Fourth: (Action against incompetent). If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and if a guardian has been appointed, to such guardian and to the defendant personally.
>
> Fifth: (Personal service on defendant). In all cases, to the defendant personally, or if he be not found, to some person of the family above the age of fourteen years at the dwelling house or usual place of abode of the defendant."

There was no attempt made to serve Sylvia A. Henderson following the granting of the Motion to add parties defendant and inasmuch as there was no

general guardian or guardian ad litem appointed by the Court at the commencement of this trial, or during the course thereof, it is apparent that the sole owner of the real property against which the foreclosure was granted and which was ordered for sale was never before the Court as a party defendant.

It should be further noted that the authority to add Sylvia A. Henderson, a minor, as a defendant was granted several months prior to the actual trial and that there was opportunity on the part of all plaintiffs to have a summons issued and directed to the said Sylvia A. Henderson and that none of the plaintiffs considered it necessary to have this important action taken to bring Sylvia A. Henderson before the Court as a proper defendant.

THIRTEENTH POINT RAISED: 13. THAT THE TRIAL COURT ERRED IN APPOINTING AUDREY CUTTING GUARDIAN AD LITEM AT THE CLOSE OF THE TRIAL BY ITS ORDER NUNC PRO TUNC.

Section 62-1-21, Compiled Laws of Alaska 1949, provides that the

> "District Court shall have the power to appoint a guardian to defend the interests of any minor * * * impleaded in such Court or interested in any suit or matter therein pending and the power to appoint a guardian ad litem for such infant * * * to commence, prosecute or defend any suit on behalf of said infant * * *"

Infancy, therefore, in Alaska Courts, is a disability and no infant can be brought into Court in a proper action unless through a guardian or guardian ad litem. The plaintiffs in the present case, in most instances, ignored the position of the infant, Sylvia A. Henderson as sole owner of the real property (Sylvia A. Henderson was first referred to in a Notice for Motion for Leave to Intervene and make additional parties defendant, filed on October 21, 1948, TR 141), filed their actions against the former owner, Ralph Thomas, who had previously and on or about the 30th day of November, 1946, divested himself of all right, title and interest in said property and Audrey Cutting as reputed owner and assuming, for the purposes of this argument, that the plaintiffs were ignorant (regardless of the Notice of Motion of October 21, 1948, TR 141) of the ownership of the property by the infant Sylvia Henderson and of her indispensable position as a party defendant for a proper adjudication of this case, the Court immediately cured the defect of ignorance upon the opening of the trial on the 8th day of February, 1949, by calling attention to the fact that Audrey Cutting was answering for her minor daughter, Sylvia A. Henderson (TR 241, Lines 10-17) and on Page 242, Line 9, the Court stated as follows:

> "In looking over the pleadings I notice that no where is Sylvia A. Henderson named as a party."

Attorney Davis, thereupon called the Court's attention to the fact that the name Sylvia A. Henderson

appeared in a Complaint in intervention filed by Mr. McCarrey, attorney for Anchorage Sand and Gravel Company, and that her name appeared in the title of the case, about five lines up from the bottom of the page. (TR 242, Line 9). This subsequent inclusion of Sylvia A. Henderson as a party, however, in a complaint in intervention, when the original complaints, No. A-5087 and A-5088, did not include Sylvia A. Henderson as a party and all other complaints in intervention ignored the position of Sylvia A. Henderson as sole owner of the property and made no effort to obtain service upon her, is not competent to make Sylvia A. Henderson a party to this action.

Thus, at the commencement of the trial, before any testimony was taken, attention of all parties and their attorneys was called to the fact that Sylvia A. Henderson had some interest in the proceedings and that she had not been properly made a party thereto and obviously had not been served with process. Upon the commencement of the taking of testimony and immediately following the testimony of Arthur A. Waldron, Attorney Grigsby called Appellant Audrey Cutting as his witness and established the fact that the true owner of the real property against which the lien claims were filed was Sylvia A. Henderson, a minor. No question was raised regarding the witness Cutting's right, at this time, to either appear in Court on behalf of her minor daughter or to ascertain whether she had been appointed legal guardian for her daughter and was properly in Court on her daugh-

ter's behalf. Without further reference at this time to the question as to guardianship and the matter regarding the legality of the proceedings insofar as Sylvia A. Henderson was concerned, the trial continued and the matter of guardianship was only brought into the proceedings again when the plaintiffs rested their case and the defense called Audrey Cutting. Attorney McCarrey, on cross examination, raised the question of guardianship (TR 396) and upon further re-direct examination (TR 398) Mrs. Cutting's counsel raised the question of guardianship and adduced that while Mrs. Cutting had made application for guardianship, that such guardianship had not been consumated and the matter was then gone into further (TR 403) and counsel for the defendants stated to the Court

> "I believe, then, that I was endeavoring to determine whether Mrs. Cutting was actually guardian or whether there was just proceeding in process."

to which the Court replied,

> "And she was uncertain. She caid there were proceedings in court but she doesn't know the precise state of the proceedings. I suppose if that is of ANY CONSEQUENCE the files can be brought in or some other proof will be given to show just what the status of the guardianship proceedings are at this time." (Emphasis ours).

whereupon the following exchange between attorney and witness occurred:

"Q. (By Mr. Butcher): Then I will ask, Mrs. Cutting, during any of the times mentioned in the various complaints and during the construction of this home and the filing of the liens, were you the guardian of Sylvia Henderson?
(Testimony of Audrey Cutting)

A. I hadn't been appointed by the Court, no.

Q. When did he commence the present proceedings?

A. In December.

Q. In December of 19——?

A. 1948.

Q. And you, I believe, testified that Mr. Peterson represented you?

A. Yes, sir.

Q. Had you ever in any other Court at any time been appointed guardian for Sylvia Henderson?

A. I was under the impression I was her guardian but I hadn't actually been appointed.

The Court: I beg your pardon?

The Witness: I was under the impression due to it but I had not been appointed officially by the Court.

Q. (By Mr. Butcher) Had any papers been processed in Nome making you guardian?

A. Nothing else but the divorce decree.

and the testimony of Mrs. Cutting above stated, established the fact that Mrs. Cutting was not guardian of Sylvia A. Henderson and her relationship to said Sylvia A. Henderson was only that of a parent who had obtained custody in previous divorce proceedings and nothing else. The Court, on TR page 403, Line 17 through Line 23, by its statement, indicated or suggested that the question of guardianship, at least insofar as the Court was concerned, had no consequence. It is the opinion of appellants that the question of guardianship was of the greatest consequence and that if Mrs. Cutting was not the guardian of Sylvia A. Henderson, by legal appointment of any Court, then she could not possibly represent Sylvia A. Henderson in the subject trial and inasmuch as the Court had not felt it necessary to appoint Audrey Cutting guardian ad litem for the purposes of this trial until the end of the trial, then it is obvious that the proceedings insofar as they involved Sylvia A. Henderson, had no validity and the subsequent decree of the Court was invalid as far as Sylvia A. Henderson was concerned, nevertheless the said Sylvia A. Henderson, a minor, had been, by erroneous decree of the Court, deprived of her property without due process of law.

Upon the completion of the case when plaintiffs and defendants both rested (TR 558, Lines 21-27),

counsel for the defendants moved the Court that the action be dismissed against the defendant, Sylvia A. Henderson (TR 559), commencing with Line 5 and continuing to Line 9, TR 562). The Court, thereupon, denied the Motion to Dismiss as to Sylvia A. Henderson and responded as follows: (TR 561, commencing with Line 11)

> "The Court: Pardon me, before citing the cases. Was there not an order made here appointing Mrs. Cutting as guardian ad litem for the minor?"
>
> "Mr. Butcher: Not to my knowledge."
>
> "The Court: The Court now makes such an order and the plea may be amended if necessary to conform with that order and to BRING SYLVIA HENDERSON INTO COURT. Counsel was in error in not heretofore advising the Court that he did not represent Miss Henderson. I assumed that it had all been arranged." (Emphasis ours).

It is appellants contention that the Court, by refusing to dismiss the action against Sylvia Henderson, a minor, committed error and denied to the said Sylvia Henderson her rights under the law. We cite in support Williston on Contracts, Section 248, Page 735, which reads as follows:

> "An infant cannot personally prosecute an action in court. An action on his behalf must be brought either by his guardian or by a next friend. It is a good plea in abatement that a plaintiff who sues

without a guardian or next friend is an infant. And if a judgment is entered against an infant plaintiff who sues without thus being represented, the judgment will be voidable * * * If the infant has no general guardian, or if the general guardian has an adverse interest, the court will appoint a guardian ad litem. The infant has no power to bind himself by an appearance on his own behalf, or by an attorney of his own appointment, or by a next friend; and a judgment obtained against the infant without the appearance of a guardian, or guardian ad litem, is voidable, as is a judgment against an infant who was represented only by a guardian whose interests were adverse."

We further cite the following cases: Parker vs. Smith 117 So. 249, which was heard in 1929 and holds that

"If an infant is not legally served, appearance of his solicitor will not bind infant."

Laute vs. Gearhart, 165 A. 115, affirmed 170 A. 646, a New Jersey case and holds that

"An attorney is unauthorized to acknowledge service for infant defendant."

Lehy vs. Hardy 232 N. Y. S. 543. This is a New York Appellate decision heard in 1929 and holds that

"Attorney's appearance in behalf of infant for whom no guardian ad litem has been appointed, is ineffective."

We further cite the case of Power vs. Lenoir 56 Pac. 106 which holds as follows:

"Where a father appeared as guardian for his minor children without having qualified as their guardian, and defended an action against them with reference to their separate property, a nunc pro tunc order appointing him their guardian ad litem before judgment rendered against them was unauthorized, and they were not bound by the judgment so entered."

In the case of Sealey vs. Smith, 197 Pac. 490 Supreme Court of Oklahoma 1921, the Court held, in interpreting a statute regarding service of summons upon minors similar to the Alaska statute, as follows:

"We are unable to understand how the trial court in the case at bar can sustain the validity of a judgment divesting a minor defendant of valuable property under the record as it appears in the case at bar. It is the duty of a trial court to guard the interest of infant defendants and see that every available defense is made for them in the trial of a cause, and under the statutes in force in this state it is mandatory upon the trial court to appoint a guardian ad litem to represent infant defendants. The first duty of the trial court

is to examine the service made upon a minor defendant, and if the same is regular approve the same, and then appoint a guardian ad litem, who must make the defense for such defendants."

We also call the attention of the Court to the case of Halton vs. State, 225 Pac. 894, Supreme Court of Oklahoma, 1924, in which the Court, in passing on the question of summons as it pertains to minors and appointment of guardian ad litem, spoke in the following language:

"The only way a defense for a minor can be made is by a guardian appointed for such purpose. The statute is mandatory in this respect, and any proceedings had against a minor, without the appointment of such a guardian to defend for him, are null and void and not binding upon said minor, and, under such circumstances, the court is without jurisdiction to render judgment against said minor."

An examination of Amer. Jur. Volume 27, Title "Infants," under the general heading "Actions by and against infants," Section 113, we find the following general law pertaining to service upon infants and the appointment of guardian ad litem:

"When an infant appears as a party to an action pending before a Court, he becomes a ward of the Court, and it is its duty to see that his interest is protected."

Section 116:

"An infant can neither sue nor defend a suit in his own name bust must be represented by an adult."

Section 120:

"The legal representative of an infant, in making defense to an action, was called at the common law his guardian ad litem, and this term is preserved in modern practice * * * If the infant or his friends do not take steps to procure the appointment of a guardian to defend for him, the plaintiff's counsel * * * must call it to the attention of the court and see that a guardian is appointed for every infant defendant, at the risk of having his judgment rendered erroneous by the omission." * * * "The fact that an infant defendant is actually represented at a trial by his parents, or that adult defendants whose interests are the same as those of the infant are making proper defense by their counsel, does not cure failure to have a guardian ad litem appointed to represent the infant."

See Johnson vs. Waterhouse 26 N. E. 234 and State vs. Stark 129 N. W. 33. Section 138:

"The fact that the law prescribes a special method of defense by an infant defendant does not dispense with the regular and legal service of process against him in beginning the action * * *

"According to the present weight of authority, it is irregular and erroneous to appoint a guardian ad litem for an infant or (where such service is permitted, as in the case of some jurisdictions, especially with reference to infants under fourteen) on a parent, guardian, or near relative in behalf of the infant." * * *

"Where an infant has not been served with process, a judgment or decree against him or affecting his interests is erroneous, and the appointment of a guardian ad litem, or an appearance or answer by said guardian, does not bring the infant before the court, so as to justify such judgment or decree."

In support of the above rule, Am. Jur. cites the case, among many others, of Bank of U. S. vs. Ritchie (1834) 8 Pet (US) 128, 8 L ed. 890, wherein a suit to sell a decedents real estate for the payment of debts, a guardian was appointed for infant heirs not served with summons, on motions of plaintiffs counsel, without bringing the infants into court or issuing a commission to make the appointment, the court said that this was contrary to the most approved usage and was certainly a mark of inexcusable inattention as the adversary counsel was not the person to name the guardian. For this and other irregularities, the decree was reversed.

Referring further to 27 American Jurisprudence, Infants, Section 138, we quote

"It has been held that in original cases in the courts of the United States sitting in equity, a guardian ad litem cannot be appointed nor the infant bound until service of process upon him." * * *

"Where it appears affirmatively on the face of the record that the infant has not been served with summons, the infant is not bound by the proceedings."

In the case of Clark vs. Neves 57 S. E. 614, a case arising as a result of an attempt to sue minors and the procurement of judgment based on the signature of a party who certified that she was the guardian ad litem and accepted service on behalf of certain minor children, the Court held as stated above, that where the record shows no service on the infant he is not bound by the proceedings.

Section 140 of the same title, Am. Jur., reads as follows:

"An infant can neither acknowledge nor waive the regular service of process upon him. Jurisdiction is not conferred by the appearance of the infant or by that of an attorney at law. A general appearance and filing of a demurrer by counsel for the defendants cannot be treated as an appearance for infant defendants who were not served, where there were also adult defendants. Moreover, the father of an infant defendant may

not enter the infant's appearance in a suit in which the latter is named defendant. Furthermore, acknowledgement out of the state, by the father of an infant defendant, of service of summons is ineffectual to bring the infant before the court.

An appearance or answer by a guardian ad litem does not bring the infant before the court where he is not served, and a judgment rendered under such circumstances is voidable. There is, however, a conflict of authority as to whether such a judgment is void. It is often held that a guardian ad litem cannot waive service of process, or confer jurisdiction by making appearance or filing pleadings for the infant. It is held in many cases that the lack of service of the infant is a fatal, because jurisdictional defect, and cannot be cured by the appointment of a guardian ad litem and his making actual defense for the infant; this ruling seems consistent with the lack of power on the part of the guardian to bind the infant by his admissions or stipulations."

It, therefore, appears that under the law, no proper adjudication could be made of the real property of Sylvia A. Henderson and the Court erred in rendering the Decree and Judgment and ordering the sale of said real property to pay off the liens. The Court, it appears, made a double error in this particular instance. First, by failing to appoint a guardian ad litem

for and on behalf of Sylvia A. Henderson, a minor, when the Court, at the commencement of the trial, was informed that Sylvia A. Henderson was a minor and itself observed (TR 243, Line 9) that Sylvia A. Henderson had not been made a party defendant and later when it was specifically drawn to the Court's attention that the child had no general guardian; and its subsequent failure to dismiss the action insofar as Sylvia A. Henderson was concerned when it was brought to its attention that Sylvia A. Henderson had never been made a proper party defendant, had never been served with legal process and had only been made a party defendant, in the case, through the filing of a Notice of Motion for leave to intervene and make additional parties defendant, and that the Court's action in its oral opinion previously quoted, in amending sua sponte all complaints to show Sylvia A. Henderson a proper party defendant, and in the Court's language "bring her into court" (TR 561, Lines 15-21) was ineffective and of no legal significance.

It must not be overlooked here that the sole owner of the real property was Sylvia A. Henderson, a minor, that she had been sole owner since the 30th day of November, 1946, when she took delivery of a deed from Ralph R. Thomas and gave back a purchase money mortgage to the said Ralph R. Thomas and ultimately paid off the note based on the mortgage. To consider that Sylvia A. Henderson was not the owner of the property, because of her failure to record the deed until the 4th day of August, 1948, is to

deny title, without sufficient cause. Failure to record under the Alaska law only affects the title holder in the event of future conveyance from the original vendor to an innocent purchaser for value. Ralph R. Thomas had no interest whatever in the real property at the time the deed was recorded or at any time previous, from the date of conveyance to the date of recording, except that of mortgagee until payment was made. He had nothing to do with the construction of the building, made no contract therefor, did not appear in the case to defend his position and had no right, title or interest to be adjudicated. The decision of the trial affected no one except a minor female who was not served with process and had no guardian appointed to represent her at a trial PRIMARILY CONCERNED with the disposition of her real property.

FOURTEENTH POINT RAISED: 14. THAT THE TRIAL COURT ERRED IN FINDING AGAINST THE EVIDENCE THAT THERE WAS NO DELIVERY OF THE DEED OF THE REAL PROPERTY FROM RALPH THOMAS TO SYLVIA A. HENDERSON and FIFTEENTH POINT RAISED: 15. THAT THE TRIAL COURT ERRED IN FINDING AGAINST THE EVIDENCE, THAT SYLVIA A. HENDERSON DID NOT EXECUTE A MORTGAGE TO RALPH THOMAS OF SAID REAL PROPERTY.

NOTE: Points Fourteen and Fifteen will be considered together.

Appellants contend that the trial court erred in finding that there was no delivery of the deed from Ralph Thomas to Sylvia Henderson.

The testimony of Audrey Cutting relative to the deed and mortgage and mortgage note appears in the Transcript of Record, commencing on Page 409, Line 25 and continues to TR 423, Line 4. Cross examination of the witness Audrey Cutting on the subject of the deed and mortgage occurs in the Transcript of Record commencing on Page 425 and continues to the bottom of Page 429 and for argument on this point, we set forth the contents of "Defendants' objections to Findings of Fact and Conclusions of Law and Judgment as Proposed by Plaintiffs" (TR 74) and adopt the language and argument of that objection to support Points Fourteen and Fifteen. We quote the contents as follows:

Findings of Fact and Conclusions of Law, which under our code, are essential to judgment in non-jury cases must be found and determined in accordance with well established principles of law, one of which we quote as follows:

"Findings are clearly improper when made in favor of a party who, having the burden of proof upon an issue, offers no evidence relative thereto."

This quotation is made from Bancrofts Code Practice and Remedies, Volume II, Section 1692, Page 2173, and the same section in Volume III of Bancrofts Supplement, page 2219, reads as follows:

"But a finding contrary to uncontradicted evidence is not authorized."

These rules of law are supported by the cases of Rudneck vs. Southern California Metal Company, 193 Pac. 775, In re Rasmussen 205 Pac. 72, and Watkins vs. Glass, 89 Pac. 840 and Richards vs. Jarvis, 258 Pac. 317.

It is defendants' contention that paragraph XXIX, page 7, of the proposed Findings of Fact and Conclusions of Law not only is not supported by the evidence, but that the plaintiffs, on whom rested the burden of proving that there was no delivery of the deed, offered no evidence whatever on the subject and that the only evidence offered was by the defendant, Audrey Cutting, and by the introduction of the deed itself and the copy of the mortgage into evidence, together with the mortgage note.

Disregarding all oral testimony of the witness Audrey Cutting, and concerning ourselves with the deed alone, we find that the deed itself creates a legal presumption of delivery as of the date of its making. This rule is clearly stated on page 84 of the last edition of Jones on Evidence Civil Cases, Volume I, Section 50, and which reads as follows:

"So where a deed is duly signed, attested and witnessed, there arises a presumption of sealing and delivery and the time of its execution and delivery is presumed to be on the day of its date."

This rule of law is amply supported by ruling cases and by other text writers on the subject, "Pre-

sumptions in Evidence." Therefore, by the deed alone, there was created a presumption of delivery in the defendant, Sylvia Henderson, which until rebutted by evidence that no delivery occurred, was controlling. The writer has been unable to find any case whatever which indicates that the act of recording is any evidence of the act of delivery under such circumstances.

The presumption of delivery by virtue of the deed placed the burden of proving non-delivery of the deed on the plaintiffs.

The unrebutted presumption of delivery of the deed to the defendant, Sylvia Henderson, standing alone would prevent a finding as set forth in paragraph XXIX of the proposed findings, however, the presumption of delivery does not stand alone. It is supplemented by the uncontradicted testimony of Audrey Cutting and the further proof, also uncontradicted, of the making of the mortgage and its signing by Sylvia Henderson together with the mortgage note. There is, therefore, no basis for the finding of delivery on August 4, 1948, as set forth in paragraph XXIX and no basis in law by which the court could find otherwise than in accordance with the uncontradicted proof of the defendant.

Therefore, it is requested that the finding that there was no delivery of the deed until after construction of the buildings be struck from the Findings of Fact and the Judgment.

The foregoing was filed in opposition to paragraph XXIX of the Findings of Fact and Conclusions of Law endorsed and entered by the Court on April 4, 1949.

An examination of the law, as it pertains to delivery of deeds, indicates, as stated above, that the act of recording has nothing whatever to do with the act of delivery insofar as it bears upon the fact of delivery. The Court found that delivery of the deed did not occur until August 4, 1948, because it was on that date that recording occurred.

Tiffany on Real Property, Volume IV, Section 1034, Page 199, under the general heading "Modern view; intention as controlling over manual transfer" lays down the following principles of law:

> "While, as before stated, the necessity of delivery in connection with negotiable and sealed instruments, and others of an analogous character, is still fully recognized, the crude conception of a manual transfer of the instrument as the only means of making it legally effective, which gave birth to the expression "delivery" as used in this connection, has been superseded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that it shall be legally operative, however this intention may be indicated. Accordingly, it is generally agreed that delivery does not

necessarily involve any manual transfer of the instrument, and provided an intention is indicated that the deed shall take effect, the fact that the grantor retains possession of the instrument is immaterial. So, while it is frequently said, both by the older and later authorities, that delivery may be made to a third person for the benefit of the grantee, or to one of several grantees for the benefit of all, meaning thereby that the conveyance may take effect by reason of physical transfer of the instrument to a third person, this would seem to result, not from any particular virtue in the transfer, but from the fact that the transfer may show an intention to make the instrument legally operative. A declaration to such third person of an intention that the deed shall take effect would seem to be quite as effective as a manual transfer to him, if satisfactorily proven, and would indeed, as affording indubitable evidence of the grantor's intention, have a conclusiveness that might be lacking in the case of a mere manual transfer. Such a transfer to a third person, if not made with the intention that the instrument shall be legally operative, does not constitute a delivery; nor does such a transfer to the grantee himself, if the transfer is not with such intention, but is for another purpose as, for instance, to enable him to examine the instrument, or to hold until the signatures of other grantors have been added. Of course, there

is no delivery where the deed is taken from the grantor forcibly and against his will."

If the modern view is that the intention of the parties is to determine whether delivery occurs, then the intention of Sylvia Henderson and Ralph Thomas should be determined from the conduct of the parties.

Ralph Thomas made a deed to Sylvia Henderson dated November 30, 1946, on the same or the day thereafter (TR 413, Lines 16 and 17) (TR 426, Lines 11 and 12) a mortgage and note were executed.

The testimony of Audrey Cutting with reference to the deed and mortgage occurs commencing TR 409, Line 25 and continues through direct and cross examination to TR 430, Line 3. The examination shows that the deed was drawn up by the witness Cutting's attorney, Stanley McCutcheon, and that it was signed by Ralph R. Thomas, that on the same day, Attorney McCutcheon also drew a mortgage from Sylvia Henderson to Ralph Thomas for the same property as described in the deed, together with a note for $1,500.00. That both mortgage and note were signed by Sylvia A. Henderson and the note by both Sylvia A. Henderson and Audrey Cutting, that these papers were then turned over to Mr. McCutcheon and were later placed in the Union Bank. Mrs. Cutting was unable, at the time of trial, to find the original mortgage but did procure a copy of the mortgage from the office of Attorney McCutcheon. This mortgage was entered into evidence as defendants' exhibit

No. 103, and appears in the Transcript of Record, Page 415. The original of the note was then introduced into evidence, marked defendants' exhibit No. 104 (TR 419).

The direct examination established the fact that the deed was delivered and a mortgage (Purchase Money) taken back by the vendor Ralph Thomas; and the cross examination supported the fact and strengthened the direct testimony. There was no evidence offered by plaintiffs to impeach this testimony.

For reasons not disclosed the deed, mortgage and note were turned over to the Bank and none of the papers were recorded until the recording of the Deed on August 4, 1948.

Tiffany on Real Property, Volume V, Section 1262, Page 13, on the legal effect of "recording" reads as follows:

> "The rule first above referred to, that, as between conveyances of the legal title, the first in time must prevail, has been entirely changed by the recording acts, which exist in every state, and which provide in effect that a conveyance or mortgage of land, and frequently any other instrument affecting land, shall not, as against a subsequent conveyance or mortgage in favor of a purchaser for value, be valid, unless it is filed for record in a public record office. The requirement of record has almost invariably been regarded as intended for the protection of sub-

sequent purchasers only, so that a failure to record the instrument in no way affects the passing of title as between the parties thereto. The grantor merely retains, by force of the statute, a power to defeat the conveyance, if not recorded, by a subsequent conveyance to another.

The construction placed by the courts upon the recording acts has been in effect to protect a subsequent purchaser as against a prior instrument, if he pays value in ignorance of such instrument, and to make the record of an instrument in accordance with the act equivalent to notice to the subsequent purchaser of the existence and contents of the instrument, irrespective of whether he actually examines the records so as to obtain such information. And the record is notice not only of the instrument and of the facts stated therein, but also of any other matters as to which the necessity of an inquiry is suggested by statements in the instrument. The practical effect of the acts is that an intending purchaser of land may, by reference to the record, determine whether his vendor has previously disposed of any interest in the land and also ascertain both the person from whom his vendor obtained the land, and whether such person had disposed of any interests to a person other than such vendor, and so, in the case of each of the successive owners of land, determine whether during the period of his ownership, he

created any interest not vested in the present vendor. The series of successive conveyances by virtue of which the vendor or another asserts ownership of the land is frequently referred to as his or the "chain of title," each conveyance constituting, figuratively speaking, one link in the chain."

This would indicate the general rule that title passes to the vendee regardless of recording. In the State of Maryland, by special statute, title does not pass until recording occurs, the law in Alaska is different and in Alaska, as shown by the case of Wooldridge vs. Williams, 5 Alaska Reports 149, recording has no effect upon title. This case holds as follows:

"Whether or not an instrument is required to be recorded under the bankruptcy laws depends upon the laws of the state or territory wherein the property is situated. Humphrey vs. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; Thompson vs. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577. It has been held that a state statute which requires a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons, is a law by which recording is "required" within the meaning of the Bankruptcy Act of July 1, 1898 (see Chapter 541, 60a, as amended by Act Feb. 5, 1903; Loeser vs. Savings Deposit Bank & Trust Co. 148 Fed.

975), and that "if recording be not required, unless required for all purposes, it could never be said to be required where the instrument is valid between the immediate parties without recording" (In re Beckhaus, 177 Fed. 141, 100 CCA 561).

Undoubtedly, under the statutes in force in this district, conveyances of real property may be recorded (section 499 C. L. A.); but a record is not required for all purposes. As between the parties themselves, a conveyance is good without record.

'Every conveyance of real property within the district hereafter made which shall not be filed for record as provided in this chapter shall be void (as) against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded.' Section 524, Comp. Laws Alaska 1913."

Certainly the deed between Ralph R. Thomas and Sylvia A. Henderson served to vest legal title in her ,and by giving such a deed, Ralph R. Thomas divested himself of all right, title, and interest, and held nothing back to be foreclosed upon. On November 30, 1946, title passed to Sylvia A. Henderson. On August 4, 1948, title was in Sylvia A. Henderson, and at all times between those dates title was vested in Sylvia A. Henderson and at the time of trial was her

sole property. We quote Section 22-3-25, Compiled Laws of Alaska 1949, which reads as follows:

> "Every conveyance of real property within the Territory hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

It is contended that a mechanic's lien holder is not an innocent purchaser for value and that only an innocent purchaser for value (Purchaser of the realty) is protected by failure of the owner to record, and that an unrecorded deed is not in that classification of "other incumbrances" and that the legislature, by using the phrase "other incumbrances" referred to in Section 26-1-3, Compiled Laws of Alaska 1949, which reads as follows:

> "A lien created by this code upon any parcel of land shall be preferred to any lien, mortgage, or other incumbrance which may be attached to the land subsequent to the time when the building or other improvement was commenced, or the materials were commenced to be furnished and placed upon or adjacent to the land; also to any lien, mortgage or other incumbrance which was unrecorded at the time when the building structure, or other improvement was

commenced, or other materials for the same were commenced to be furnished and placed upon or adjacent to the land; * * *"

meant encumbrances in the nature of mortgages, liens, etc., and not titles to the realty itself. In other words, a deed, being an instrument of title, is not an encumbrance upon its own title.

The case of Schwartz vs. Rappaport et al, 187 N. Y. S. 611, heard by the Supreme Court of New York, April 6, 1921, which case holds as follows:

"In the absence of a statutory provision, the holder of a mechanic's lien has no greater rights than a judgment creditor, and his lien is subject to the rights of those holding deeds or mortgages, though unrecorded when the mechanic's lien was filed." quoting Payne vs. Wilson, 74 N. Y. 348, 355 et seq.

Bouvier's Law Dictionary Unabridged has the following definitions of the word incumbrance:

"1. Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee."

2. Every right to or interest in the land which may subsist in third persons to the diminution of the land, but consistent with the passing of the fee by the conveyance."

and in further defining what incumbrances are, Bouvier lists the following:

An ordinary lease
An attachment
The lien of a judgment
Taxes and municipal claims
An execution sale subject to redemption
A restriction of the use of land for a brewery
An inchoate right of dower
An easement for a party wall
A private right of way
A railroad right of way
An attachment
A right of removal of timber from land
A reservation of minerals
A public highway
An outstanding mortgage
A liability under tax laws
A condition of non-performance of which by the grantee may work a forfeiture of the Estate
A restriction as to the kind of building which may be erected on land
A mechanic's lien

All the foregoing have been held to be incumbrances. It would thus appear that the Alaska legislature which used in its lien statute the phrase "and other incumbrances" did not intend that a deed itself was an incumbrance which necessarily would have to be upon the very land to which the deed gave title.

THE SIXTEENTH POINT RAISED WILL NOT BE ARGUED.

ADDITIONAL ARGUMENT

This argument deals with the effect of the contract entered into between Russell Smith and Audrey Cutting for construction of the residence. It will be noted that Paragraph 24 of the Contract provides as follows:

> "The Contractor shall promptly pay for all materials, supplies, and all labor employed by him in the work to the end that the property may be kept free from materialmen's and mechanic's liens, and shall promptly discharge such liens, if any."

It will also be noted that the contractor's credit was not good. (Testimony of Arthur Waldron, TR 251, Line 19) (Testimony of Harry Goudchaux, TR 517, Lines 23-26) (Testimony of Lyle Anderson, TR 327, Lines 5-28), and he was apparently near insolvency at the time he made the contract with Audrey Cutting.

It was necessary for him, regardless of the specific condition of his contract, i. e. to pay all wages and bills for materials promptly, to make a special agreement with laborers and materialmen, to wait until the building was erected and he had collected the contract price from Audrey Cutting, for payment of their wages and accounts. (TR 273, Lines 21-28).

The evidence is indisputable that the contractor did not keep the costs of construction within the contract price, i. e. $9,800.00 or the extra $200.00 to $400.00 (TR 259 and TR 284). The total sum of all the laborers and materialmen's liens as set forth in the original lien claims and prayed for in the complaints and as awarded by the Court, excluding the lien claims of Russell Smith, and not including interest, recording fees, etc., is $11,533.76, and is computed as follows:

Laborers:

Ray Bullerdick	$ 627.77	
A. L. Baxley	914.88	
Edward C. Rankin	494.76	
Lee Runckle	734.16	
Arden Bell	760.76	
Wm. Besser	64.00	
Total Wages	$3,596.33	$ 3,596.33

Materialmen:

Brady's Floor Covering	$ 474.41	
A. V. Fritts	700.00	
City Electric	473.99	
Arthur A. Waldron and J. A. Columbus	377.61	
Arthur A. Waldron and J. A. Columbus	628.27	
Ketchikan Spruce Company	2,717.86	
Alaskan Plumbing & Heating Co.	1,685.00	
Ken Hinchey	680.49	
Ray Wolfe	199.80	
Total	$7,937.43	$ 7,937.43
Grand Total Costs		$11,533.76

The above represents the exact cost of the labor and material for construction of the house. Assuming that the contractor added to his costs (a point on which he was silent) a legitmate contractor's fee, or even wages for his own time, to come out even, he would have had to bill Mrs. Cutting in excess of $13,000.00. This excess cost of construction is, of

course, at the heart of the difficulty. Mrs. Cutting stood ready and willing at all times to pay the contractor $10,000.00, i. e. the contract price of $9,800.00 plus $200.00 for the extra porch (TR 357, Lines 10 to 26).

Upon the contractor's demand for $13,500.00, Mrs. Cutting refused to make payment, offering instead the amount of the contract plus the extra. Meanwhile, the laborers, who had not been paid as a result of their own concession to wait until the completion of the job for payment, together with the materialmen, filed lien claims, which were subsequently foreclosed by the Judgment and Decree.

CONCLUSION

It appears to us in retrospect that the issues of this case are clear and we are of the opinion that had the various counsel participating in the case and the Court had been better informed on the law regarding mechanic's liens, the rights and limitations of infants, guardianship and Court procedure under actions involving guardian ad litem, that the issues could have been made much clearer during the trial of the case. It appears, however, that the ultimate effect of the judgment and decree was to deprive a minor female of her property without due process of law, i. e. failure of process, failure in appointment of guardian ad litem, and that the judgment and decree affects in no way the defendant, Ralph Thomas because he was fully paid for the

property and affects only an infant who was not present in the Territory of Alaska during the period from the filing of the liens to the entry of judgment and decree.

It is earnestly and respectfully submitted that the Findings of Fact and Conclusions of Law and the Judgment and Decree rendered and entered by the trial Court were contrary to the evidence and contrary to the law and thus in error and that the Judgment and Decree should be reversed with the true principles of law and equity applied in this case.

Dated at Anchorage, Alaska, this 4th day of October, 1950.

HAROLD J. BUTCHER
Attorney for Appellants